UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

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| GEORGE HARRIS and ELLIS McDANIEL, APPELLANTS, VS. L. C. HAMMOND, OPERATING AS L. C. HAMMOND & COMPANY, APPELLEE. | NO. 10841 ERROR TO THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION. |

APPELLANTS' MOTION FOR RE-HEARING

And now come the appellants in the above entitled cause, within the time allowed by the order of this Honorable Court, dated November 22, 1944, and respectfully moves the court for a re-hearing, upon the following grounds, to-wit:

-1-

Because, it is respectfully contended, that this Honorable Court has misconceived a pertinent and controlling legal question presented by appellants' appeal when on page two of its decision, the issue is stated as follows:

"The question for decision is whether these employees are within the coverage of 6 and 7 of the Act".-

Whereas the question involved is whether these employees are within the coverage of 6 or 7 of the Act; it appearing from the findings of the trial court, based upon the undisputed evidence, that appellants are entitled to recover under Section

6 of the Act, as to minimum wages. The finding of the trial court and the evidence in support of that finding being as follows:

On page 38 of the record the trial court finds: "One of the plaintiffs, McKay, spent one day each week soliciting orders and making collections in South Carolina . . . Another plaintiff, Harris, drove the truck for one day each week in South Carolina, making deliveries of goods sold to customers there, and when not so engaged, he hauled goods in the truck from the railroad to the store and unloaded and hauled goods into the warehouse . . . The third plaintiff, McDaniel, assisted the truck driver in the performance of his work".

The above findings of the court are based upon the following undisputed evidence of the plaintiffs.

Plaintiff Harris testified: "I was employed by L.C. Hammond & Company from October 23, 1938 to June 15, 1941. As such employee my duties was truck driver, I drove the truck to South Carolina delivering freight. This delivering and hauling took up practically all of my time. That was my job. The goods that came to Hammond & Company's store came in carloads and truck loads, and we hauled them out from railroad cars. I drove the truck and I had a helper, a warehouseman, Ellis McDaniel, would help me . . . The flour they bought came in car lots bought from brokers - five or six or seven of them would come there and sell goods. They would buy flour, nails, cements and such and various goods in carload shipments, that would come into Georgia from other States, and I would unload them from the railroad cars and put them in the warehouse." (R.pp.14-15).

The other plaintiff, Ellis McDaniel, testified: "I was in the employ of L.C. Hammond and Company from October 23, 1938 until August 1, 1942. I was warehouseman. The merchandise bought by Hammond & Company came into Augusta in trains, car boxes. George Harris and I would haul the stuff from the railroad to the warehouse. I helped to load the trucks and deliver the goods. My duties were hauling the goods into the warehouse and delivering the goods to customers of L.C. Hammond & Company, which took up all of my time. These shipments that came in were shipments from other States. L.C. Hammond & Company was conducting at the time a wholesale grocery and feed business. They bought their groceries from brokers, eight of them, they would buy flour, groceries, feeds and salt in carload lots, they also handle hardware and building cements and things like that". (R. pp. 16-17).

J. H. McKey, a salesman for defendant, but not a party to this appeal, testified: "I was in the employ of L. C. Hammond & Company from October 23, 1938 to December 28, 1939. It was my duty to spend the entire day on Mondays on the road in South Carolina as a salesman and collector . . . This list of retail merchants you hand me were customers of L.C. Hammond & Company in South Carolina and Georgia. They bought merchandise practically every week. This list of 153 merchants varied from time to time. L. C. Hammond & Company were wholesale merchants during the time of my employment, they also made some retail sales every day in the week. . . As to the amount of retail sales to farmers, I would say it would not run over 25%. As to the amount of retail business done with South Carolina farmers, it would be about 10% of its total business. I mean to say that 10% of it could have been retail

in South Carolina. I would say 90% wholesale and 10% retail". R.pp. 10-11).

2.

Because, it is respectfully contended, that this Honorable Court by its decision of November 1, 1944, has laid down as a rule of law that the appellants, as truck drivers and warehousemen of the defendant, are not covered by either 6 or 7 of the Act, and in view of the aforesaid finding of the trial court and the undisputed evidence quoted, said decision of this Honorable Court is contrary to the express provisions of the Act and the decision of the Supreme Court and of this court construing the Act.

"It is the character of services rendered by the employee, and not the business of the employer, which determines the applicability of the law". Walling vs. Jacksonville Paper Co., 317 U.S. 564; Kirschbaum vs. Walling, 316 U.S. 511; Collins vs. Kidd Dairy Co., 132 F.(2d) 79 - the latter decision being by this court.

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Because, it is respectfully contended, that this Honorable Court has apparently overlooked and has made no ruling or reference to appellants' assignments of error, and particularly grounds 2, 3 and 4, which are set out and fully discussed in appellants' brief, and which we earnestly insist require a different ruling from that made in the case.

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Because this Honorable Court on page 3 of its decision makes the following finding or statement of fact, which is

contrary to the undisputed evidence in the case and the finding of the trial court, to-wit: "Moreover, if the plaintiffs here had performed any service which was interstate, they have signally failed to show to what extent this service was performed".

The said finding is also contrary to the admission made by the defendant in the pleadings, the plaintiffs having alleged as follows, and which is not denied by the defendant, to-wit: "That in the operation of said business the defendant purchases in States other than Georgia and in wholesale quantities, goods, wares and merchandise which were transported to defendant by common carriers, and at all times herein mentioned it was and became the duty of plaintiffs to receive and assist in unloading the said goods from said common carriers, and to convey the same by truck into the warehouse of the defendant; that the defendant sells to customers in States other than Georgia and in wholesale lots, goods, wares and merchandise, and it was and became the duty of plaintiffs to assist in loading, checking and delivering said goods, wares and merchandise from defendant's warehouse". (R.pp. 2-6).

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Because, as appellants respectfully contend, that while they may not be covered by the overtime provisions of the Act, they are clearly covered by Section 6 of the Act, based upon the former ruling of this Honorable Court and the Supreme Court. In the case of Reuter, Inc. vs. Walling, Admr., 137 F. (2d) 315, this Honorable Court held:

"A fruit and vegetable wholesaler's truck drivers and

their helpers when engaged in unloading produce from freight cars coming from out of the State and when engaged for substantial part of their time in hauling such produce from freight cars to wholesaler's place of business were covered by minimum wage provision of Fair Labor Standards Act, but truck drivers were not subject to overtime provisions of the act, Fair Labor Standards Act of 1938".

"A fruit and vegetable wholesaler's employees when engaged for substantial part of their time in preparing, selling, shipping, or delivering for shipment orders to out of state customers, or buying, jordering, paying for, keeping records on goods purchased from out of the state were covered by minimum wage and overtime provisions of Fair Labor Standards Act, Fair Labor Standards Act of 1938".

"The unloading activities carried on by employees at warehouses constitute part of the substantial incoming interstate movement of goods and such employees are therefore engaged in commerce within the meaning of the Act." Baltimore R.R. vs. Bartch, 263 U.S., 540, 544; Walling vs. Jacksonville Paper Co., 63 S.Ct. 332; 317 U.S. 564.

"That the purchase of goods destined for importation across State lines is interstate commerce, whether delivery is made to warehouses or directly to stores, is clear from the decided cases. "Federal Trade Commission vs. Pac.Paper Co., 273 U.S. 52: Brennan vs. Titusville, 153 U.S. 289; Caldwell vs. N.C. 187 U.S. 622, 632; Dozier vs. Ala., 218 U.S. 124.

The defendant Hammond himself testified: "Retail grocers and wholesale grocers are classified in Augusta Directories, looking at the 1929 City Directory I am classified as a wholesaler . . From

1938 right on through 1942 I am listed along with other exclusive wholesale grocers in Augusta . . . There has never been a time when I was not doing some wholesale business." (R.p. 262). See also Record p. 33-34, where defendant made a sworn statement that he was doing a wholesale business only.

WHEREFORE appellants respectfully pray that they be granted a rehearing and that a judgment be rendered in this case in accordance with the law and the facts.

Paul T. Chance

ATTORNEY FOR APPELLANTS

Due and legal service of a copy of the foregoing motion for a rehearing is hereby acknowledged.

All other and further notice and service waived.

This the 2nd day of December, 1944.

Curry & Curry

ATTORNEY FOR APPELLEE

STATE OF GEORGIA, )
RICHMOND COUNTY. )

I the undersigned, as counsel of record for the appellants, do hereby certify that after a careful examination of the decision of thes Honorable Court dated November 1, 1944, I do verily believe that the questions of law and fact referred to and set out in the foregoing motion for a rehearing were overlooked by the Court.

I further certify that on account of the limited time in which appellants had to present this motion, the same could not be printed and that the present appeal is in forma pauperis.

This the 2nd day of December, 1944.

Paul T. Chance

ORDER DENYING REHEARING.

Extract from the Minutes of December 15th, 1944.

GEORGE HARRIS, ET AL.,

No. 10841 versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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CLERK'S CERTIFICATE,
UNITED STATES OF AMERICA,
UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 57 to 72 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals forthe Fifth Circuit, in a certain cause in said Court, numbered 10941, wherein George Harris, et al., are appellants, and L. C. Hammond, operating and doing business as L. C. Hammond & Company is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the typewritten transcript of the record numbered from 1 to 56 are identical with the typewritten transcript of the record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of January A. D. 1945.

Oakley F. Dodd

Clerk of the United States Circuit Court of Appeals, Fifth Circuit.